

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SUPPLY TECHNOLOGIES, LLC

and

Case No. 18-CA-19587

TEAMSTERS LOCAL 120

Catherine M. Homolka & Pamela W. Scott, Esqs.,
for the General Counsel.
Stephen S. Zashin & Patrick J. Hoban, Esqs., for the Respondent.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota on February 10, 2011. The charge was filed by Teamsters Local 120 (the Charging Party) on November 3, 2010, and amended on December 14 and December 21, 2010.¹ On December 27, 2010, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint alleging that Supply Technologies, LLC (the Respondent) had engaged in unlawful conduct in violation of Section 8(a)(1) and 8(a)(4) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) by instituting an alternative dispute resolution program, known as Total Solution Management or “TSM” which unlawfully interferes with its employees’ right of access to the Board’s processes under Section 7 of the Act, and by threatening to discharge employees who refuse to agree to the TSM. It further alleges that the Respondent violated Section 8(a)(4) and (1) of the Act by discharging the following 20 employees for refusing to sign the TSM agreement: Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua. By answer dated January 7, 2011, the Respondent denied having committed any unfair labor practices.

At trial, all parties were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ All dates are in 2010, unless otherwise indicated.

Findings of Fact

I. Jurisdiction

5 The Respondent, an Ohio corporation with an office and place of business in Minneapolis, Minnesota, is engaged in the business of supplying parts and materials to manufacturers and distributors. During the past calendar year, the Respondent, in the course and conduct of its business operations, purchased and received at its Minneapolis, MN facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Minnesota. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Factual Background

15 The Respondent is a division of Park Ohio Industries and, as noted, operates a facility in Minneapolis Minnesota, as well as three other facilities in the Midwest.² Its employee complement consists of 89 employees, 74 of whom work at the Minneapolis facility performing warehouse, quality assurance, administrative, and sales functions,³ and 15 other employees assigned at its various Midwestern facilities.

20 On June 21, 2010, the Union filed a petition with the Board seeking to represent “All full time and regular part-time warehouse and drivers” employed by the Respondent at the Minneapolis facility. (GCX-3). An election among said employees was thereafter held on August 4. The Union, however, did not prevail in its efforts for, of the 44 valid votes cast, 22 were cast for, and 22 against, Union representation. The results were thereafter certified by the Board on October 18. (GCX-5).

25 Three days later, on October 21, Park Ohio Industries instituted the TSM program at its Minneapolis and other facilities.⁴ It was to be effective at the Minneapolis facility on October 22, and on October 25 at its other facilities. (GCX-6, p. 4). With some exceptions more fully discussed below, the TSM program requires employees to utilize a 3-step procedure as the sole means for resolving any and all claims against the Company.

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² The Respondent’s other facilities are located in Des Plaines, Illinois, Memphis, Tennessee, and Lenexa, Kansas. (See GCX-6, p. 4-Respondent’s position statement to the Board).

35 GCX-6 was received into evidence at the hearing over the Respondent’s objection. (Tr. 76). The Respondent, on brief (see Respondent’s brief, p. 9, fn. 9), renews its objection to the receipt of GCX-6 into evidence. I adhere to my ruling, for the Board has long found position statements to be properly admissible into evidence. See, e.g., *Roman, Inc.*, 338 NLRB 234 (2002); also, *Salon/Spa At Boro, Inc.* 356 NLRB No. 69, slip op. page 40, fn. 13 (2010); *McKenzie Engineering Co.*, 326 NLRB 473, 492 at fn. 6 (1998); *Optica Lee Borinquen*, 307 NLRB 705, at fn. 4 (1987).

40 ³ The employee complement at the Minneapolis facility includes some 17-18 employees who speak Hmong, a dialect from Southeast Asia. Of these, only about 5-6 are fluent in the English language. (Tr. 37-38).

45 ⁴ The Respondent, in the past, has apparently used a mandatory arbitration program at its other facilities. (see GCX-6, p. 2).

1. The TSM program

Step 1 of the TSM calls for employee claims to be investigated by a TSM Administrator who is required to, within 30 days, make a determination and issue a written "Step One Determination" letter to the parties.⁵ Step 2 allows a dissatisfied party (employee or Company) to appeal the TSM Administrator's decision to a neutral mediator by filing a "Step 2 Mediation Demand" form with the TSM Administrator within 30 days of the latter's initial Step 1 determination. If mediation is unsuccessful, the TSM Administrator will provide the employee with a "Step Two Determination" letter, after which the employee can, if he/she chooses, request arbitration of the claim by submitting a "Step 3 Arbitration Demand" form to the TSM Administrator.

Employees at the Minneapolis facility were first notified of the TSM program in mid-afternoon on October 22, as the morning shift was ending. That afternoon, employees were given copies of a memo from Respondent's Human Resources Vice-President, Betty Boris informing them of the Company's new procedure for dispute resolution, along with three other sets of documents outlining the TSM program. The documents included: (1) The "Official Rules" of the TSM program; (2) the TSM agreement, entitled "Agreement to Use," which employees were to sign and return to their supervisor by 9:00 a.m. on October 26; (3) a document containing "Questions and Answers" designed to explain the TSM program. (See, Jt. X-2(a-c)). The Boris memo instructed employees to contact Human Resources if they had any questions regarding the TSM program.

As spelled out in the TSM's "Official Rules," and again in the "Agreement to Use," the above-described 3-step grievance arbitration procedure was, with some limited exceptions, to be the sole method used by employees and the Company to "resolve all of their disputes, controversies, and claims with each other." The "Official Rules" and "Agreement to Use" documents both make patently clear that the only claims expressly exempted from the TSM procedure are those involving workers compensation claims, unemployment claims, and criminal claims. Other than these three categories of claims, all other claims employees might have, or wish to raise, against the Respondent would have to be processed, heard, and resolved exclusively through the TSM program.

Both the "Official Rules" and "Agreement to Use" documents list some, but not all, of the types of claims that must be heard exclusively through the TSM program. The list of claims identified in both documents, however, do not entirely coincide with each other. The "Agreement to Use" document, for example, lists, inter alia, all "claims unrelated to my employment with Supply Technologies" as being subject to the TSM procedure, language not found among the types of claims listed in the "Official Rules" document. On the other hand, the "Official Rules" document lists "claims for embezzlement, restitution, misappropriation of trade secrets" as subject to the TSM procedure; no such or similar language is found in the "Agreement to Use" document.

The "Official Rules" document also specifically lists "claims for discrimination, harassment, or retaliation" as being subject to the TSM process. The document, however, does not specify what types of "discrimination, harassment, or retaliation" claims would fall within this subject category and appears to be all-encompassing and rather sweeping in nature. Thus, it is unclear if an employee who, for example, claims to have been discriminated, harassed, or

⁵ The record does not make clear if the TSM Administrator is a management official or some other individual.

retaliated against for engaging in Section 7 protected or union activity at Respondent's facility would be required to have his/her claim heard under the TSM program. Notably, no similar language is found in the "Agreement to Use."

5 The "Agreement to Use," however, does expressly provide that an employee and the Company "can still file a charge or complaint with a government agency...,"⁶ and is "free to cooperate with a government agency that might be investigating a charge or complaint." Oddly enough, this stated right to file a charge is not included in the "Official Rules" document. Nor is this purported right to file a charge with a government agency without restriction, for the
10 "Agreement to Use" also makes clear in language following recitation of the above-stated right that an employee who opts to file such a charge "waives any right [he/she] might have otherwise had to any remedy that the agency might try to obtain on our behalf (to the extent this is permissible under law.)" No explanation was provided either at the hearing, or in its post-trial brief, by the Respondent as to the meaning, purpose, or intent of this "waiver" language, or how
15 it related to the preceding language regarding the right of employees to file a charge in the first place. A plain reading of this language, however, strongly suggests that while employees might arguably have the right to file a charge with a government agency under the TSM, they nevertheless would not be entitled to any remedial relief that could be available to them from the agency with which the charge was filed.

20 2. The distribution of the TSM documents to employees

Neng Moua was one of the employees who received the TSM package on October 22. He testified that at around 2:45 p.m. on October 22, his supervisor, warehouse manager Ted
25 Hambrook, approached him and directed him to a nearby conveyor belt where copies of the TSM program were stacked in four different piles. The first pile consisted of copies of claim forms employees were to use when submitting a claim under the TSM program; the other three piles contained copies of the above-described sets of TSM documents, e.g., the "Official Rules," the "Agreement to Use", and the "Questions and Answers."

30 Hambrook instructed Moua and others who were working nearby to take copies of the TSM packets. He told Moua and the others that the packet had been sent from Human Resources, and that they were to take the packet home, "read it, sign it, and bring it back by the due date on it," namely, October 26. Moua recalls hearing another employee, Hue Yang, ask
35 Hambrook what the documents were, and Hambrook responding, "I don't know. Read it." Moua claims he and other employees then took copies of the TSM packet and began glancing at the information. Hambrook, who had a checklist with employee names on it, began checking off the names as employees picked up their packets, and instructed employees to sign the checklist acknowledging they had received the TSM packet. He told employees as they did so that they
40 had to read and sign the TSM agreement and return it to the Company. (Tr. 52-53). The twenty employees named in the complaint as discriminatees all received copies of the Boris memo along with the TSM documents packet. (See JTX-1).

45 Moua, who is fluent in both Hmong and English, testified that he took the TSM documents home and read them. He testified, however, that while he was able to read the documents given his fluency in English, he did not fully understand their contents. Moua recalled that during the weekend he spent reading the TSM packet, several co-workers called him to ask what the packet meant, apparently unable, like Moua, to fully understand what they

50 ⁶ The "Questions and Answers" document contains a similar reference to the right of employees to file a claim with government agencies. (JX-2[b]).

were being asked to sign. Moua told these co-workers that he was “not really sure exactly what it’s all about,” but that they should continue to read it and they could discuss it on Monday when they reported for work.

5 On reporting for work on Monday, October 26, Moua observed that employees were discussing the TSA program among themselves, and that they seemed somewhat edgy and concerned about the program. The following day, Tuesday, when the signed TSM agreements were to be turned in by employees, Michael Beyer, Respondent’s branch manager, approached Moua shortly after 9:00 a.m. and asked to speak with him. Moua agreed and followed Beyer to
10 a conference room where they had a discussion about the TSM program. Beyer then handed Moua a copy of the TSM program and told him that the 9:00 a.m. deadline for the signed TSM agreements to be turned in had passed, and that he was giving Moua “one last chance to sign this document and turn it in to me.” He cautioned that if Moua did not sign it, he “would no longer work for this company.” Moua told Beyer that he could not sign the TSM agreement, to
15 which Beyer replied, “Well, if you’re not going to sign it, then you can no longer work here and I’m going to have to walk you out.” Beyer then escorted Moua out of the facility.

Moua gave two reasons for not signing the TSM agreement. Thus, he testified that, while able to read the TSM documents given to him, he simply did not fully understand how the
20 program worked, and was unwilling to sign something he could not understand. He further was of the view that the TSM program would effectively prevent him from exercising other rights he had. Moua found the information in the TSM packet to be confusing and inherently self-contradictory. By way of example, he explained that while the TSM policy does state that employees can file a charge with a government agency, he nevertheless concluded from the
25 “waiver” language in the same provision, that employees who file such a charge “cannot get relief” from the agency, and that the agency “cannot do anything for you” even if the charge were deemed to be meritorious by the agency. Thus, Moua’s testimony suggests that he viewed the right mentioned in the TSM policy, about employees being able to file a charge with a government agency, as meaningless since their entitlement to any remedial relief they might
30 obtain from the filing of any such charge would, under the TSM program, be forfeited or waived. Moua explained that “its things like that that made me really confused about this document,” referring to the TSM policy. (Tr. 48).

Beyer, Moua contends, never asked him why he did not want to sign the TSM
35 agreement, nor did he explain the TSM documents or program to him. Moua, for his part, likewise did not ask Beyer to explain or clarify any questions or doubts he may have had regarding the TSM program. (Tr. 46-48). He admits not having contacted Human Resources regarding the TSM program as was suggested in the Boris memo. Moua added that while, in the past, e.g., some 5-6 years earlier, he had not had any difficulty going to Human Resources
40 with questions, more recently he felt uncomfortable doing so. (Tr. 67). As Beyer did not testify, Moua’s testimony stands unrefuted. For this reason, and as Moua came across as a wholly plausible and believable witness, I credit his testimony and find that Beyer did threaten to discharge Moua if he did not sign the TSM, and thereafter fired Moua when the latter declined to do so.

45 1 Hlee Yang, who also declined to sign the TSM agreement, testified, via interpreter, that, at around 9:35 a.m. on October 26, as he was working his shift, Beyer and Hambrook approached and asked him to sign the TSM agreement. When he explained to them, with his limited English skill, that he did not understand the TSM documents, they advised that if he did
50 not sign the TSM agreement, he would be fired. Beyer and Hambrook then led him into an office at which point Beyer repeated that if Yang refused to sign, he would be terminated. After Yang apparently declined to sign the agreement, Beyer and Hambrook instructed him to “get

out,” that he could not stay in the facility, and escorted him off the premises. Yang recalled seeing other employees waiting outside the office as he was being escorted out (Tr. 137-138). Hambrook did not testify, nor as, noted, did Beyer. Accordingly, I credit Yang’s version of this October 26, meeting with Beyer and Hambrook and find that he too, like Moua, was threatened with discharge if he did not sign the TSM agreement, and that he was thereafter likewise terminated for declining to do so.

Another employee, Kham Seng Lee, testified, also via interpreter, to being approached by Hambrook and Beyer around 9:30 a.m. on October 26, as he was working his shift, and taken to a meeting room where Beyer asked him if he had signed the TSM agreement. Lee replied he had not because he did not understand it, and needed one or two weeks to fully read and understand it. Beyer said he could not do that, but that if Lee signed the agreement, he could continue working; if he did not, he would have to go home. Lee responded that since he did not understand the agreement, he was not going to sign it, to which Beyer replied, “If you don’t sign, then you need to go home.” Beyer told Lee that he could not stay in the facility a minute more and had to leave. He and Hambrook then escorted Lee out of the facility. Lee was not certain if he had been fired, but assumed this to be the case since he was told he had to leave immediately and could not stay in the facility a minute longer. Lee’s testimony as to what transpired between him and Beyer (as well as Hambrook) is unrefuted. (Tr. 147-148). Accordingly, I find that Kham Seng Lee was implicitly threatened with termination when told he would have to leave the facility unless he signed the TSM agreement, and was, in fact, terminated when instructed to leave the facility immediately and to go home following his refusal to sign the agreement.

Charlie Lee also worked for the Respondent until October 26. Like the above-discussed employees, Charlie Lee, who understood and spoke some English but testified with the aid of an interpreter, was approached on the morning of October 26, by Beyer and asked if he had signed the TSM agreement. Charlie Lee replied he had not, and Beyer told him, if he had not signed the agreement, he no longer worked for the Company. He told Charlie Lee that if he signed the agreement, he could stay on. Like the other employees’ testimony, Charlie Lee’s account of his October 26, meeting with Beyer was not disputed as the latter did not testify. As with Kham Seng Lee, I find that Charlie Lee was similarly threatened with discharge unless he signed the TSM agreement, was thereafter terminated for refusing to do so.

It is undisputed, and the parties so stipulated, that, in addition to Moua, Hlee Yang, Kham Seng Lee, and Charlie Lee, some 16 other named alleged discriminatees who declined to sign the TSM agreement ceased working for the Respondent on or around October 26. It is also patently clear from the witnesses who testified, and the Respondent does not dispute, that the provisions of TSM program were never discussed with, or explained to, employees.

As to the 16 other named discriminatees, none was called to testify. There is, therefore, no evidence as to what, if anything, may have been said to them by Beyer, Hambrook, or any other management official on their refusal to sign the agreement. The Respondent, however, does not contend, nor was any evidence produced to show, that they were treated or told anything different from what was said or done to Moua, Hlee Yang, Kham Seng Lee, and Charlie Lee when they refused to do so. I am convinced, and so find, that like Moua and the other three named discriminatees who did testify, the other 16 named discriminatees had the same or very similar experience, to wit, they were instructed to sign the agreement or they would not be able to continue working, and, on their refusal to do so, were told to leave and immediately escorted out of the facility. Thus, I find that these 16 individuals were likewise also threatened with discharge if they did not sign the TSM agreement, and then terminated for refusing to do so.

The complaint, as noted, alleges, and Counsel for the General Counsel contends, that Respondent's TSM arbitration policy, which employees were required to accept as a condition of their continued employment, is unlawful in that it effectively interferes with the employees' Section 7 right to file charges with, or to otherwise seek redress from, the Board for any work-related grievances they may have against the Respondent arising under the Act. She further alleges that Moua, Hlee Yang, Kham Seng Lee, Charlie Lee, and the sixteen other employees who declined to sign the TSM agreement were unlawfully terminated for doing so. The Respondent disagrees, insisting that its TSM policy expressly recognizes its employees right to of access to the Board, and that the employees who left rather than accept the TSM policy were not terminated but voluntarily resigned. I find merit in Counsel for the General Counsel's contentions.

B. Discussion

It is well-settled that Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges. *Braun Electric Co., Inc.*, 324 NLRB 1, 3 (1997). An employer rule or policy that unduly interferes with or restricts that right will be found to be unlawful. *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In determining if a company rule or policy, like the mandatory TSM arbitration policy at issue here, unlawfully interferes with an employee's Section 7 right of access to its processes, the Board looks first at whether the rule or policy explicitly prohibits or restricts such protected activity. If so, the rule or policy will be found to be unlawful. If, however, the rule or policy does not explicitly restrict Section 7 activity, it may nonetheless still be found unlawful if (1) employees would reasonably construe the language of the rule or policy to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *U-Haul*, supra at 376; *Lutheran Heritage Village-Livonia*, supra; also, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). When making this determination, the Board will give the rule or policy in question a reasonable reading, and will refrain from reading particular phrases in isolation or presuming improper interference with employee rights. *Lutheran Heritage Village-Livonia*, supra, and *Lafayette Park Hotel*, supra, also *Turtle Bay Resorts*, 353 NLRB 1242, 1270 (2009); *Albertson's, Inc.*, 351 NLRB 254, 258 (2007).

Here, a fair reading of the Respondent's TSM grievance-arbitration policy does not disclose any express prohibition on its employees' right of access to the Board. Counsel for the General Counsel admits as much (see GCB: 10), but contends that there other provisions in the TSM which could equally be read as precluding the filing of charges with the Board, or are so ambiguous, confusing, and contradictory that employees would be unable to determine whether or not they retained the right under the TSM to file a charge with the Board or to utilize its processes.

The Respondent counters that not only is there no express provision in the TMS policy prohibiting or denying employees access to the Board, the policy, in fact, expressly affirms the right of employees to utilize the Board's processes, referring in this regard to the language in the "Agreement to Use" stating that employees are free to "file a charge or complaint with a government agency," and to similar references to this right found in the "Questions and Answers" document. It contends on brief, as it did at the hearing, that there is no ambiguity in the TSM policy regarding employee rights, that the employees' right of access to the Board is

expressly stated in clear and unambiguous terms which employees could readily understand. It claims instead that Counsel for the General Counsel has intentionally “parsed, twisted, and selectively edited the TSM to conjure ambiguity from clarity,” and that, if allowed to speak for itself, the TSM language “demonstrates that the program does not restrict, interfere with, or limit an employee’s access to the Board.”(Tr. 31-32).

The Respondent’s assertion, that the TSM language should be allowed to speak for itself, makes very good sense as it accords with the Board’s directive in *Lutheran Heritage Village-Livonia*, supra, and *Lafayette Park Hotel*, supra, that individual or particular phrases of a disputed rule or policy not be read in isolation but rather be considered with the policy as a whole in determining its validity. Its assertion, however, while valid, nevertheless brings to mind the cautionary phrase, “Be careful what you wish for...,” for a review of the various provisions of the TSM policy, including the language cited and relied on by Respondent, leads me to conclude, in agreement with Counsel for the General Counsel, that the policy is, at best, ambiguous and confusing, and thus unlawful.⁷

The Respondent, as noted, relying solely and exclusively on the TSM language in the “Agreement to Use” document granting employees the right to file a charge or complaint with a government agency, claims that this language gives employees the unfettered and unrestricted right to file charges with the Board or to utilize its processes. Its claim, however, does not withstand scrutiny, for, as previously discussed, the TSM provision containing the language relied on by the Respondent also contains language requiring employees who choose to file such a charge to waive their right to any remedial relief they might otherwise be able to obtain from the government agency like the Board.⁸ This waiver requirement, in my view, renders meaningless whatever right employees purportedly have under the TSM to file a charge with the Board, and would, I find, have a chilling effect on an employee’s willingness to exercise their Section 7 right to do so.

Clearly, an employee interested in filing a charge with the Board, possibly over some adverse employment action that might have been taken against him at the workplace, could reasonably conclude, after reading the provision in its entirety, that it would be pointless to do so given the provision’s “remedy” waiver requirement. Indeed, the requirement in the provision that employees relinquish any right to a remedy on filing a charge with the Board would, if anything, serve to deter and discourage employees from exercising their Section 7 right to bring a charge

⁷ In arguing for the validity of its policy, the Respondent appears to pay only lip service to the *Lutheran Heritage Village-Livonia* and *Lafayette Park Hotel* requirement that a rule or policy be considered as a whole when its validity is being assessed. Thus, it is the Respondent, not Counsel for the General Counsel, who, as discussed infra, selectively identifies the one provision in the TSM policy that it deems most supportive of its position, and ignores other equally relevant provisions which appear to contradict or be inconsistent with the cited provision it relies on. By contrast, Counsel for the General Counsel, in her post-trial brief, has fully discussed and addressed all of the pertinent provisions in the TSM policy, including the language relied on by the Respondent (see GCB:20), in making her argument that the policy is unduly restrictive of, or prohibits outright, the Section 7 right of employee to have access to the Board.

⁸ The Respondent makes much of the fact that the “Question and Answer” document also notifies employees of their right to file a charge with a government agency. What the “Question and Answer” document, however, fails to mention to employees is that this right to file a charge also carries with a requirement that employees waive their right to any remedy that might flow from the filed charge.

before the Board or to utilize its processes. If this was not what the Respondent intended to convey through this provision, it never made its intention known to employees before requiring them to accept the TSM program, nor did it offer or provide any clarification or explanation at the hearing or in its brief to this rather ambiguous provision in its policy.

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At best, however, the inherent contradiction in the provision, between the averred right of employees to file a charge with a government agency, and the requirement therein that they waive their right to any remedy that might accrue from such a charge, could reasonably and understandably confuse employees as to the extent and true nature of their Section 7 right to file any such charge. Moua's assertion, which I credit, that he found the language in the TSP policy, stating that he was free to file a charge but denying him any remedial relief, "really confusing," attests to the provision's ambiguity. Kham Seng Lee's credible claim that he did not understand the policy, and needed more time to review it, a request which was denied him, further attests to the confusing nature of the TSM policy.

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Nor is the above-discussed provision in the "Agreement to Use" document the only ambiguous and confusing language in the TSM policy regarding an employee's right of access to the Board for, as previously indicated, there is yet other language in the TSM which, on its face, appears to prohibit or deny employees their Section 7 right to file a charge with the Board. For example, the "Official Rules" and the "Agreement to Use" documents in the TSM policy both contain provisions stating, in clear and unambiguous terms, that "the **only** claims" employees can bring against Respondent outside the TSM policy are "criminal claims, and claims for workers' compensation or unemployment compensation benefits." Conspicuously missing from this list of exclusions to the TSM program are claims that employees might wish to file with a government agency, such as the Board. Notably, the word "only" in the above-referenced language of the "Agreement to Use" is highlighted in boldface type, intended, I am convinced, to emphasize and convey to employees in no uncertain terms that these, and *only* these, three types of claims were exempt or excluded from coverage under the TSP arbitration program.

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These same provisions also make clear that all other claims employees might want to pursue against Respondent through other avenues, which presumably would include the filing of an unfair labor practice charge with the Board, "**must** be brought under the TSM program." The word "must" in the above provision is also highlighted in boldface type to, I am further convinced, convey and make clear to employees that the TSM program is the only and exclusive forum they have in which to address claims that do not fall within any of the three named exclusions (e.g., criminal claims, workers' compensation claims, unemployment claims). Clearly, the wording is intended to let employees know that use of the TSM program for resolution of claims other than the three types listed therein is mandatory and not optional. This particular provision, therefore, appears to be at odds, and in conflict, with the language in the previously discussed provision relied on by the Respondent which purports to give employees the right to file a charge with a government agency, such as the Board.

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No explanation was proffered by the Respondent as to why the language in the "Agreement to Use" purporting to allow employees to file a charge or complaint with government agencies was not included in the TSM "Official Rules." The latter document, as noted, sets forth the procedural rules to be followed in the grievance arbitration process, and lists, in some detail, the types of claims that have to taken through the TSM, as well as the only three types of claims (criminal, workers' compensation, and unemployment claims) not subject to the TSM policy. There is nothing in the record or the TSM policy itself to suggest, nor has the Respondent contended, that this was some inadvertent omission on its part. Presumably, employees signing on to the TSM program were agreeing to bound to the terms and provisions contained in both the "Agreement to Use" and the "Official Rules." However, the unexplained and glaring

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omission in the “Official Rules,” of the right of employees to file a charge or complaint with a government agency set forth in the “Agreement to Use,” would undoubtedly cause confusion in an employee’s mind as to which of the two TSM documents was accurate. Clearly, both cannot be accurate, for one, the “Official Rules,” could reasonably be read as denying employees that right, while the “Agreement to Use” appears to confer the right on employees.

Further adding to the ambiguity and confusion in the TSM policy are yet other provisions expressly prohibiting, inter alia, employees from filing claims outside the TSM program “relating to my application for employment, my employment, or the termination of my employment”, claims “for discrimination, harassment, or retaliation,” or claims “arising under any federal statute.”⁹ These broadly-worded provisions contain no exemptions or exclusions for claims that might arise under the NLRA. These provisions, therefore, either standing alone or in conjunction with the other previously-discussed ambiguous provisions, would reasonably lead employees to conclude that they could not file a charge with the Board to protest, say a discharge, suspension, retaliation, etc. resulting from their involvement in protected or union activity, since such a claim would obviously relate to their employment and raise a statutory claim under the NLRA, a federal statute. See, *U-Haul Company of California*, 347 NLRB 375 (2006).¹⁰

In sum, a plain reading of the TSM policy as a whole, including the various provisions therein which arguably relate to or address the right of employees under Section 7 of the Act to file a charge with the Board or to utilize its processes, reveals a rather ambiguous policy rife with contradictions and inconsistencies regarding said right. Employees perusing the TSM policy for guidance on whether they were free to file a charge with the Board or to use its processes would, I am convinced, come away either believing that the policy prohibits or severely limits their right to do so, or understandably confused and unsure as to whether they had such a right. This confusion clearly would have been magnified among the Hmong employees who possessed limited or no ability to speak and/or understand English. The Respondent, as noted, never took the time to explain or clarify the contradictions and ambiguities in its policy to any of its employees.

It is well settled that any ambiguity in a rule or policy will be construed against its promulgator. *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, slip op. at 27 (2010); *Bryant Health Center*, 353 NLRB 739, 745 (2009). Here, the ambiguities in the TSM policy, on the question of whether employees retain their Section 7 right of access to the Board, are substantial enough to render the policy invalid. When an employer rule or policy, like the TSM policy here, is so ambiguous that it can reasonably be interpreted by employees in such a way as to cause them to refrain from exercising their statutory rights, the rule or policy will be deemed to be invalid. *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456 (2003); also *U-Haul*, supra.

⁹ See bullet point items No. 1 and No. 2 in the policy’s “Agreement to Use,” and bullet point items No. 1, 2, and 4 in the policy’s “Official Rules.” (JTXs 2[a], 2[c]).

¹⁰ In *U-Haul*, an arbitration policy that mandated coverage of all causes of action recognized by “federal law or regulations” was found by the Board to be unlawful. While acknowledging that the *U-Haul* policy did not explicitly restrict employees from resorting to the Board’s remedial procedures, the Board nevertheless found that employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy. Here, the Respondent’s employees, as noted, would just as readily construe the requirement, that all “claims for violation of a federal...statute” be brought through the TSM program, as including NLRB-related claims.

Accordingly, I find the Respondent's TSM policy to be unlawful, and its implementation and maintenance to be a violation Section 8(a)(1) of the Act. I further find that the Respondent also violated Section 8(a)(1) when it threatened the 20 named discriminatees with discharge if they did not sign and accept its unlawful policy, and violated Section 8(a)(4) and (1) of the Act when it thereafter discharged said employees on their refusal to do so. *U-Haul*, supra at 377; *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007).¹¹

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By instituting its TSM grievance-arbitration policy which prohibits or restricts its employees' Section 7 right to file a charge with the Board or to access its processes, threatening to discharge employees for refusing to sign and accept its terms, and conditioning continued employment on employee acceptance of its policy, the Respondent has violated Section 8(a)(1) of the Act.

2. By discharging employees Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua for their refusal to sign and accept and be bound to the TSM policy, the Respondent violated Section 8(a)(4) and (1) of the Act.

3. The Respondent's above-described unlawful conduct affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding the Respondent's unlawful institution and maintenance of its TSM grievance –arbitration policy, I agree with Counsel for the General Counsel that revocation of the TSM policy in its entirety at all four of Respondent's facilities is the appropriate remedy here.¹²

¹¹ At the hearing, Counsel for the General Counsel raised the argument that the Respondent initiated and implemented its TSM policy in response to its employees' union activity. While the timing of the program's implementation on October 21, three days after the Board certified the election results reflecting that the Union did not prevail, does raise a suspicion of a possible connection between the program's implementation and the union activity of its employees, there is simply no evidence for making that connection, and suspicion alone, in my view, does not suffice.

¹² In *Bill's Electric*, supra, the Board, found a similar arbitration procedure that interfered with employee access to the Board to be unlawful, but did not call for rescission or revocation of the entire policy. Rather, in agreement with the judge, the Board found it proper to require the employer therein to "modify" the policy to ensure that it included language stating "that the procedure does not apply to any matter an employee may choose to bring before the Board," and ordering it to cease enforcing the procedure as to any matter brought before the Board. In *Bill's Electric*, however, the arbitration procedure's offending language was contained in a single

Continued

The Respondent, having unlawfully discharged employees Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua for refusing to agree to its unlawful TSM grievance-arbitration policy, must offer them reinstatement to their former or substantially equivalent positions, and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall also be order to remove from its files any reference to the unlawful discharges of the above employees, and to notify the employees in writing that it has done so, and that the discharges will not be used against them in any way.

Finally, the Respondent shall be required to post a notice to employees at the four facilities that were subject to its unlawful TSM policy. Inasmuch as some of the discriminatees, and presumably other employees at Minneapolis facility, speak Hmong and have no, or very limited, English speaking skills, the notices shall be posted in both English and Hmong.¹³

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

Order

The Respondent, Supply Technologies, LLC, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and giving effect to its unlawful TSM grievance-arbitration procedure.

(b) Threatening to discharge employees who refuse to sign and accept the TSM grievance-arbitration program.

(c) Discharging employees who refused to sign its TSM grievance-arbitration agreement.

provision, readily discernible, and thus easily subject to redaction and/or modification. Unlike in *Bill's Electric*, however, the TSM arbitration policy here is comprised of three separate documents consisting of 12 pages in all, with the various ambiguous and contradictory offending provisions spread throughout the documents. In these circumstances, I find it proper to require the Respondent to revoke the policy in its entirety as I am not convinced that piecemeal modification would effectively resolve or ameliorate the policy's overall ambiguities regarding its employees' right of access to the Board.

¹³ It is unclear if the Respondent's Minneapolis facility is the only one with Hmong employees among its workforce complement, or whether there are Hmong-speaking employees at its other three facilities. I resolve any doubts in this regard in favor of requiring the posting of the notice in both the English and Hmong language at the other three facilities.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

5 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and revoke its unlawful TSM grievance-arbitration policy.

10 (b) Within 14 days from the date of the Board's Order, offer Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

15 (c) Make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(f) Within 14 days after service by the Region, post at its facilities in Minneapolis, Minnesota, Des Plaines, Illinois, Memphis, Tennessee, and Lenexa, Kansas, copies of the attached notice marked "Appendix"¹⁵ in both English and Hmong languages. Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

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¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2010.

- 5 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 31, 2011

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George Alemán
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a grievance-arbitration procedure as a condition of employment that interferes with your right to access the Board's processes or to file charges with the Board.

WE WILL NOT discharge, or threaten to discharge, any of you for refusing to sign our TSM grievance arbitration agreement which requires you to give up your right to file a charge with, or to have access to, the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and revoke our TSM grievance-arbitration policy.

WE WILL, within 14 days from the date of this Order, offer Make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, Nhia Long Moua, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SUPPLY TECHNOLOGIES, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.